



## NATIONAL SAFETY COUNCIL

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### Position/Policy Statement

#### Workforce Drug Testing

The National Safety Council (NSC) believes that it is unsafe for workers to be under the influence of drugs (legal and illegal) or alcohol while at work due to the increased risk of injury or death to themselves and others. Employers must maintain a workplace free of all forms of impairment, regardless of the legal status of the impairing substance. Therefore, we support employers' rights to drug test workers as a condition of employment, during employment in reasonable suspicion-based or post-incident circumstances and/or in random drug-testing programs.<sup>1</sup> The NSC also supports workers' rights to privacy and the appropriate review of drug testing results by medical review officers (MROs) for third party validation of illicit drug use.

At this time, federal workers and those in safety-sensitive positions<sup>2</sup> are generally required to submit to standardized drug testing regulations. Workplaces with employees not falling in those categories must develop their own policies and procedures pertaining to workforce drug testing and must strive to maintain a workforce free from all forms of impairment.

The NSC supports:

- Development and implementation of comprehensive and consistent drug testing programs
- Drug testing job candidates as a condition of employment
- Developing clear policies appropriate for their workforce and drug testing employees according to the organization's established policies, which can include post-incident, reasonable suspicion and random drug testing
- Conducting drug testing appropriate with existing laws governing a specific workforce
- Creating easy-to-understand drug testing policies that are communicated clearly to employees so that they understand the how, when and why of drug testing
- Robust injury and incident reporting programs

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<sup>1</sup> Examples of reasonable suspicion include, but are not limited to, direct observation of drug use or physical symptoms of drug use (slurred speech, uncoordinated movement, etc.); abnormal conduct; a report from a reliable source that an employee is using drugs; evidence that an employee has tampered with his/her drug results; erratic behavior while at work or significant deterioration in work performance, and evidence that the employee has used, possessed, sold, solicited, or transferred drugs while working or at work.

<sup>2</sup> "Safety sensitive" is defined as one that if not performed in a safe manner, can cause direct or significant damage to property, and/or injury to the employee, others around him or her, the public and/or the immediate environment. For example, 49 CFR §382.107 defines safety sensitive for commercial motor vehicle operators.

## History of Workplace Drug Testing

Workplace drug testing in the U.S. started with random and suspicion-based testing of U.S. armed forces personnel in the 1980s after a crash incident investigation aboard the *USS Nimitz* revealed widespread alcohol and illicit drug use.<sup>3</sup> Beginning in 1988, federally regulated workplace drug tests have included a five-drug panel that tests for amphetamines, cocaine, phencyclidine (PCP), opiates and marijuana metabolites. This panel, used for federal employees and others as mandated by the federal government, became common for other workplaces to adopt.<sup>4</sup>

In 1989, the US Department of Transportation (DOT) published a final rule (54FR49854) requiring drug testing of private-sector, safety-sensitive transportation employees to be implemented between December 1989 and December 1990. This legislation was prompted in large part by a 1987 Amtrak crash in eastern Baltimore County, Md., in which 16 people died and 164 were injured. The locomotive crew violated several signals and operating rules, and marijuana use was deemed a contributing factor in the crash.<sup>5</sup> In 1991, Congress passed the Omnibus Transportation Employee Testing Act,<sup>6</sup> authorizing the DOT to implement both mandatory alcohol and controlled substance drug testing for employees in safety-sensitive positions in all transportation modes.

Drug tests mandated under the Omnibus Transportation Employee Testing Act are subject to procedural requirements intended to protect individual privacy, ensure accountability and integrity of specimens, require confirmation of all positive screening tests, mandate the use of laboratories operating within certain guidelines, provide confidentiality for test results and medical histories and ensure nondiscriminatory testing.

## Cannabis Impairment: A Growing Risk

The NSC believes that all forms of impairment present a serious threat to safety in the workplace by increasing the risk of preventable injury and death. Workers who are under the influence of alcohol and/or other impairing drugs (legal or illegal) may endanger themselves and those around them.

At the writing of this policy position, 11 states have legalized or decriminalized cannabis for adult recreational use, and 33 permit medical cannabis use. (As a leader in impairment (opioids, fatigue, etc.) workplace policies and consistent with advocacy in these other areas, NSC supports moving people to non-safety sensitive operational positions when using cannabis for medical purposes.) These changes in state laws have created uncertainty for employers that previously used drug testing as a determinant for employment. Each state has implemented the laws in different ways when it comes to workplace drug testing. Nevada has become the first state to prohibit pre-employment drug testing, outside of certain safety-sensitive positions, for

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<sup>3</sup> DuPont, R. L. (2015). Workplace Drug Testing in the Era of Legal Marijuana. Institute for Behavioral Health. Retrieved from <https://www.dfaf.org/wp-content/uploads/2018/08/Workplace-Drug-Testing-IBH.pdf> on Nov. 15, 2019.

<sup>4</sup> DuPont, R. L. (2015). Workplace Drug Testing in the Era of Legal Marijuana. Institute for Behavioral Health. Retrieved from <https://www.dfaf.org/wp-content/uploads/2018/08/Workplace-Drug-Testing-IBH.pdf> on Nov. 15, 2019

<sup>5</sup> <https://www.nts.gov/investigations/AccidentReports/Reports/RAR8801.pdf>

<sup>6</sup> Omnibus Transportation Employee Testing Act of 1991 (49 U.S.C.S. § 5331), retrieved from [https://www.transportation.gov/sites/dot.gov/files/docs/199111028\\_Omnibus\\_Act.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/199111028_Omnibus_Act.pdf) on Nov. 26, 2019.

cannabis.<sup>7</sup> At least two court decisions in California and Colorado have reinforced the right of employers to terminate workers who use cannabis during non-working time, even when those employees are using medical cannabis at the recommendation of a doctor.<sup>8,9</sup>

During the NSC *Cannabis: It's Complicated Symposium* in June 2019, Quest Diagnostics presented data from the National Survey on Drug Use and Health that showed businesses without drug testing programs have higher self-reported illicit drug use than businesses that conduct testing. From 2015 to 2017, as drug laws regarding cannabis changed, data from the Quest Diagnostics Drug Testing Index™ showed that eight sectors experienced double digit increases in their cannabis positivity: Accommodation & Food Services, Transportation & Warehousing, Construction, Manufacturing, Administrative Support, Waste Management & Remediation Services, Retail Trade, Wholesale Trade and Other Services. Quest reported that medical cannabis laws did not seem to impact the positivity rates while recreational cannabis laws did appear to have an impact.<sup>10</sup>

Quest also reported increases in cannabis positivity for U.S. DOT- regulated workers who operate under federal law, which still considers cannabis illegal. Given the increased use of cannabis among the workforce and especially in states that have legalized and decriminalized cannabis, employer drug testing should be allowed so that employers can make decisions that are right for their organizations.

### **Federal Workers**

For federal workers, changing state laws do not matter because the federal government still considers cannabis an illegal substance. The U.S. DOT issued guidance stating that “state initiatives will have no bearing on the Department of Transportation’s regulated drug testing program. ... It is important to note that [cannabis] remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the DOT’s drug testing regulations to use cannabis.”<sup>11</sup>

This also impacts private contractors with the federal government and some companies that accept federal government grants and other funding. The NSC recommends closely reviewing all documents associated with any work with the federal government to ensure compliance.

### **Impact on Workplaces**

Both legal and illegal substance use can lead to workforce impairment and result in increased costs as well as an increased risk of preventable injury and death. The following impacts have been identified:<sup>12</sup>

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<sup>7</sup> Nagele-Piazza, L. (2019). Nevada Curbs Use of Pre-Employment Tests for Marijuana. Society for Human Resource Management (website). Retrieved Nov. 19, 2019 from <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/nevada-bans-pre-employment-marijuana-testing.aspx>.

<sup>8</sup> Ross v. RagingWire Telecommunications, Inc. Supreme Court of California. 24 Jan. 2008.

<sup>9</sup> Brandon Coats v. Dish Network, LLC. Supreme Court of the State of Colorado. 15 June 2015.

<sup>10</sup> Quest Diagnostics (2019). Proceedings from the National Safety Council *Cannabis: It's Complicated Symposium*. <https://www.questdiagnostics.com/home/physicians/health-trends/drug-testing/industry-insights/2019-09-11-Workforce-Drug-Positivity-Increases-in-More-Than-One-Third-of-U-S-Industry-Sectors-Examined-According-to-Quest-Diagnostics-Multi-Year-Analysis>

<sup>11</sup> DOT “Medical Marijuana” Notice, Dec. 3, 2012, retrieved from <https://www.transportation.gov/odapc/dot-recreational-marijuana-notice> on Dec. 9, 2019

<sup>12</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5671784/>

- Missed work days
- Increased healthcare costs
- Increased costs related to turnover and replacement
- Increased costs related to absenteeism and presenteeism
- Greater emergency department use

Employee impairment itself can manifest itself as: <sup>13</sup>

SIGNS OF POTENTIAL IMPAIRMENT		
Physical	Mental	Performance
<ul style="list-style-type: none"> <li>• Rapid shift in physical appearance (hygiene, weight loss or gain)</li> <li>• Tremors</li> <li>• Unsteady gait, loss in manual dexterity, working in an unsafe manner</li> <li>• Odor of alcohol or other drugs</li> </ul>	<ul style="list-style-type: none"> <li>• Inappropriate verbal or emotional responses or behaviors</li> <li>• Irritability</li> <li>• Memory loss</li> <li>• Unusual isolation from colleagues</li> <li>• Lack of concentration, confusion, forgetfulness</li> <li>• Lying</li> </ul>	<ul style="list-style-type: none"> <li>• Calling in sick frequently</li> <li>• Unexplained tardiness, early departure, extended breaks</li> <li>• Errors in judgment</li> <li>• Deterioration in performance and quality of work</li> <li>• Testing positive on a drug screen</li> </ul>

However, not all employers are taking sufficient steps to combat substance misuse. A report from the Substance Abuse Mental Health Services Administration (SAMHSA) found that while 81.4% of full-time workers were employed by an organization with a written policy about employee use of alcohol and drugs in 2012, smaller firms were less likely to drug test for substance use or have drug test programs in place to combat the problem. This report also found that employees were generally less likely to illicitly use drugs in the previous month when working for an employer with a written alcohol and drug policy than one without a policy.<sup>14</sup> These data demonstrate the need for employers to develop clear policies on substance use and the potential for on the job impairment that are communicated and understood by all workers.

### Drug Testing and Injury and Illness Reporting Policies

NSC encourages robust reporting of injury and illness incidents to understand the root cause of workplace incidents. The Occupational Safety and Health Agency (OSHA) requires employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses at their establishments.<sup>15</sup> Established reasonable suspicion drug testing procedures without concern of retaliatory actions should govern workplace incident policies.

### Substance-free workplaces

NSC supports employer efforts to maintain a substance-free workforce and the use of drug testing as a way to identify workers who are using drugs that may compromise their own safety and that of others. As part of this effort, the NSC has outlined policies and procedures (below)

<sup>13</sup> <https://www.workplacestrategiesformentalhealth.com/managing-workplace-issues/impairment-and-substance-use>

<sup>14</sup> Larson, S. L., Eyerman, J., Foster, M. S., & Gfroerer, J. C. (2007). Worker substance use and workplace policies and programs (DHHS publication no. SMA 07-4273, Analytic Administration, Office of Applied Studies.

<sup>15</sup> See OSHA Laws and Regulations 29 C.F.R. part 1904 (<https://www.osha.gov/laws-regs/regulations/standardnumber/1904>)

that employers can implement to ensure protection for the employer and their workforce. To read the full policy position, click [here](#).

- Statement of the purpose and scope of the program
- Definition of what constitutes misuse, including alcohol and all forms of impairing drugs, prescribed, over-the-counter, legal, illegal, synthetic or otherwise
- Statement of who is covered by the policy and/or program
- Statement describing under what circumstances drug or alcohol testing will be conducted, including confidentiality of test results
- Procedures to ensure fair testing process ( e.g., confirmation testing, use of medical review officers, worker protections against retaliatory testing)
- Training for employees, supervisors, and others in identifying impaired behavior and substance use
- Employee education (e.g., a substance-free awareness program, comprehensive communications on substance use and impairment)
- Harm reduction (e.g., understanding how addiction differs from person to person and how those behaviors may manifest in the workplace, reduction of stigma, cultural changes and differences, industry challenges, etc.)
- Policies and procedures for dealing with impaired workers both in the immediacy of impairment, as well as follow-up policies and procedures post-impairment
- Assistance for those who voluntarily seek help for impairment issues
- Provisions for early intervention, rehabilitation, and assistance for employees with a substance use disorder (e.g., peer advocacy programs, Employer Assistance Programs (EAPs), Member Assistance Programs (MAPs), benefits available through employer group health policies, benefits available through union health and welfare funds, etc.)
- Steps of disciplinary actions for violations of the substance use policy
- Clearly defined return-to-work policies (both after an injury, and during / after treatment for a substance use disorder)

For those employers who identify people with an SUD, the data show that employers who support return to work policies following substance use disorder treatment have more productive and lower cost employees with fewer days of missed work and other benefits.<sup>16</sup> NSC has free resources to support employers developing these policies.<sup>17</sup>

*This position statement reflects the opinions of the National Safety Council but not necessarily those of each member organization.*

Adopted by the National Safety Council, 2020

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<sup>16</sup> <https://www.nsc.org/forms/substance-use-employer-calculator>

<sup>17</sup> [www.nsc.org/opioidsatwork](http://www.nsc.org/opioidsatwork)